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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JASMINE Z. et al., Persons Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

JASMINE Z.,

Minor and Appellant.

G030010

(Super. Ct. No. DP005570)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed.

Michael D. Randall, under appointment by the Court of Appeal, for Minor and Appellant Jasmine Z.

Benjamin P. de Mayo, County Counsel, and Thomas F. Morse, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for the Minor Jose Z.

Steven D. Schatz, under appointment by the Court of Appeal, for the
Minors Adrian, Alex, Gladys, and Gabriel Z.

Roland G. Rubalcava for Defendant and Respondent Norma Z.

* * *

Jasmine Z., the eldest of six siblings, appeals the denial of her motion to dismiss the petition and the subsequent jurisdictional findings adjudicating her and her siblings dependents of the juvenile court. She claims the allegations that she sexually abused her brother, Jose, are not supported by substantial evidence. Jasmine also challenges the dispositional order removing her and her siblings from her mother's custody. We affirm.

FACTS

In October 2001, Jose Z., age 11, reported to school officials that his sister Jasmine, age 12, had fondled his penis. A Child Abuse Services Team (CAST) social worker, Kathy Grammer, came to the school and investigated. She discovered that Jose is developmentally delayed and legally blind; at the time of detention he was functioning at the level of a three- to four-year-old. His special education teacher reported Jose frequently comes to school dirty. Furthermore, he masturbates "excessively in class by placing his hands constantly in his pants, pockets and under his gym shorts." The teacher had discussed the problem with the mother, who admitted "the masturbation was excessive at home and that she didn't know what to do about it." The day of detention, Jose told the teacher's aide that Jasmine rubs his penis, causing it to "get bigger." Jose told school officials "that his sister Jasmine asked his sister Gladiola [Gladys] and his brother Gabriel to touch him last night. Jose then changed the story to say that only Jasmine had touched him in the bedroom last night." When Grammer interviewed Jose, she found "[a]lthough he was easily distracted, he was able to refocus and to provide clear and concise responses" to her questions. He told Grammer that Jasmine touched his penis with her hand frequently "inside his pants at night in their bedroom," demonstrating

an “up and down motion with [his] left hand over the index finger [of his right hand].” He had told his mother, who “got mad” at Jasmine and hit her with a belt. He claimed no one else had touched him this way.

Grammer then went to the children’s home and interviewed the rest of the family. Adrian, age 10, denied any inappropriate discipline or touching by anyone in the family. The six-year-old twins, Alex and Gladys, were interviewed together. Alex said his mother uses a belt to discipline them and that Jasmine also hits him with a belt. Gladys confirmed Alex’s story, but said she never gets disciplined because she never disobeys. Both Alex and Gladys denied any appropriate touching to themselves. Gabriel, the three-year-old, said Alex had touched his “weenie,” but he did not elaborate. Jasmine denied that she had ever sexually touched Jose or any of her other siblings. Grammer detained all six children and placed them at Orangewood Children’s Home (OCH).

The next day, the intake social worker, Patty Markus, contacted the elementary school attended by Adrian, Alex and Gladys. The principal reported that “the children’s mother consistently picks up the children late, approximately thirty minutes daily.” She described the mother as “rude and defiant” to school officials and irresponsible about complying with school requests. Markus then interviewed the children individually at OCH. Jasmine said Jose masturbates “every single day” and the mother yells at him to stop. She denied touching Jose in the genital area and hitting her siblings with a belt, although she is sometimes left in charge of her siblings. Her mother “used to hit us with a belt, when I was five, but not anymore.” Gladys reported that Jose “wets the bed.” When Markus asked Alex about a bald spot on the back of his head, he explained his mother pushed him backwards, causing him to fall and strike his head on a desk. He said both his mother and her boyfriend hit him with a belt. Adrian “was very guarded and denied any abuse of anyone, by anyone.” When Jose was interviewed, he

was “silly” and excited, evading Markus’ attempts to get him to focus. He denied sexual abuse but claimed that his mother burned him on the hip with a hot iron.

Physical examinations of the children revealed that Gladys and Alex required glasses. Alex’s bald spot was a suspected skin fungus, and Adrian had “Dystrophic nails to all ten toes and several fingers, indicating possible fungus.”

The mother refused to believe the allegations that Jasmine had abused Jose. She explained that Jose had a bedwetting problem and all members of the family check his genital area for urine. She claimed he touches himself because he itches. The family’s house has three bedrooms, but one is vacant. “Initially [the mother] stated she planned to rent the room out, and subsequently claimed she was painting and redecorating it for the girls.” The five older children have shared a twin bunk bed for two months. The mother puts plastic over Jose’s part of the mattress he shares with his two brothers and she wakes him up several times a night. She had previously thrown away a mattress used by Jose because of the “severe urine odor.” The mother admitted she sometimes hits the children with a belt but denied leaving marks. Jasmine is sometimes left to care for her five siblings.

Records of the Orange County Social Services Agency (SSA) showed six prior contacts with Jasmine’s family. Seven years earlier, there was a report that the mother left her three children unsupervised “all the time” and had left Jasmine, then five years old, at a store. The child walked to the home of a relative that was a quarter mile away. The mother also reportedly threatened to burn Jasmine’s hands for touching items in the store. The report was not investigated. Four years later, there were two reports of general neglect several months apart and a report of physical abuse to Adrian. The allegations were determined to be “inconclusive” or “unsubstantiated.” In February 2000, the mother left Jose and Gladys at a shopping center, “not realizing they were not with her when she loaded up the van.” About an hour later, she realized Jose was missing and went to the police station to report it. Jose and Gladys were already there

when she arrived, and it was only then that she realized Gladys had been missing, too. A few months later, the father went to visit the children and found them left alone, with two-year-old Gabriel wandering in the street. The most recent report was made in June 2001. Gabriel had sustained a “toddler fracture” to his leg while Jasmine was babysitting. The mother did not take him to the doctor for several days, claiming he did not cry or appear to be in pain. Gabriel also had stitches above his eye “due to a fall in the shower” that were overdue for removal. The mother said she had “not gotten around” to it and was hostile and defensive.

SSA filed petitions on behalf of all the children under Welfare and Institutions Code section 300, subdivision (a) [serious physical harm], subdivision (b) [failure to protect], and subdivision (d) [sexual abuse].¹ The sexual abuse allegations consisted of Jose’s disclosures that Jasmine had fondled him by rubbing his penis with her hand and touching his buttocks, that Jose masturbates at home and at school on a daily basis, and that his behavior is “indicative of having been exposed to sexual activity.” The serious physical harm was allegedly caused by the mother striking the children with a belt, pushing Alex so that he hit his head, and her “anger control problem” evidenced by her hostile and defiant behavior with school personnel, law enforcement, and SSA. The failure to protect count was supported by the mother’s pattern of failing to pick the children up from school on time, Jose’s sexual abuse and masturbation, Alex and Adrian’s physical conditions at detention, the unhealthy sleeping arrangements in the home, and previous reports of neglect.

Twelve days after the children were detained, Jose was interviewed by a CAST social worker. He said Jasmine had “touched him on the penis one time” in the bedroom and had showed Gabriel how to touch him. Gabriel touched his buttocks that same day. Jose stated he was not wearing clothes during the incident because Jasmine

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

would not let him put on his clothes. He first said his mother came in and hit Jasmine, later saying he told his mother and she then hit both Jasmine and Gabriel. He again demonstrated the touching with his hands and said Jasmine did this so his penis would grow. Then he said Jasmine had touched him one time in the bedroom and two times in the bathroom and that she also touched “his big brother.” He stated he saw Gladys touch “Guede.” His mother hit Jasmine and Gladys “with the cord from an iron,” and she “burned Jasmine on the stove for touching [him].” Two weeks later, the social worker asked Jose if any of his brothers had touched him “in a sexual manner,” and he said Alex had touched him and he told his mother about it. His mother “smacked” Alex.

Adrian underwent a CAST interview on November 6. He denied any knowledge of inappropriate touching in his family. Two days later, however, the social worker interviewed him at OCH. Although he initially denied any physical abuse or sexual touching, he changed his story after the social worker explained the mother had admitted to using a belt and Jose had told her about the sexual touching, thus these events were no longer “secrets.” Adrian then admitted he had been hit by his mother with a telephone cable, a shoe, and a belt; he said his brother Alex often touches Jose in a sexual manner and Gladys has done so “only six times.” Adrian would not let Alex touch him this way, although he tries to do so. “If Jasmine learned of [the touching] or saw [it], she would send Alex to another part of the room. Adrian would only say that the children’s mother would discipline Alex if she learned of Alex touching Jose.”

In an addendum report prepared for the jurisdiction hearing, the social worker reported that Jose had been evaluated by a therapist in the Court Evaluation and Guidance Unit (CEGU). The therapist placed his cognitive ability at a five-year-old level; “he suffers from significant vision loss . . . as well as a pronounced delay in his gross motor skills.” She concluded his “memory is impaired and his judgment appears to be compromised. He evidences only slight comprehension of social situations.” Nevertheless, the therapist reported he was “able to answer questions regarding possible

sexual abuse perpetrated against him. He reports incidents of abuse without any obvious emotional reactions and does not appear to comprehend the significance of these behaviors. Jose recounts the allegedly abusive events factually, consistently, and without embellishment over the course of several sessions.”

The jurisdictional and dispositional hearing was held on December 6, 2001. SSA’s reports were admitted into evidence, and the social worker who prepared the reports, Noreen Lubchenko, testified. During cross-examination by Jasmine’s counsel, Lubchenko stated she believed that Alex touched Jose in a sexual manner “because Jose told me that, Adrian told me that and Jasmine had indicated that the boys touched Jose.” She did not amend the petition to add the allegation about Alex because “[i]t was not something that I felt was critical to the case.” When asked if Jasmine “had touched Jose in a manner that would be sexually gratifying to [her],” Lubchenko stated she had not formed an opinion about Jasmine’s intent.

At the close of SSA’s case, Jasmine’s counsel moved to dismiss the entire sexual abuse count and the allegations regarding Jasmine in the failure to protect count. He argued there were too many ambiguities in Jose’s reports and none of the other children corroborated Jasmine’s touching of Jose. He acknowledged there was corroboration that Alex touched Jose, but that was not alleged in the petition. Furthermore, he argued SSA had not proved Jasmine touched Jose for sexual gratification, as required by the statute. The court denied the motion.

Jasmine’s counsel then called Jose to testify. Jose denied ever touching his private parts, at school or otherwise, but he said Jasmine had done so. To everyone’s surprise, Jose described an incident where Jasmine got in bed with him and his brothers. She took her pants and underwear off and got on top of him and touched his private parts with her private part (“You know when the woman does pee?”). He explained he felt her “hole” when she was on top of him, and he demonstrated what she did with one hand clasped around the index finger of the other hand and moving up and down. He insisted,

however, she was not using her hand but her private part to “go[] up and down.” She was “showing my brothers.”

The court amended the petitions to add “and vagina” to the sexual abuse allegations and found the allegations of the amended petitions true. “To me, Jose’s message came out loud and clear, both metaphorically and as far as what the evidence here presents.” The children were removed from the mother’s custody, and the court recommended a separate placement for Jasmine.

DISCUSSION

Jasmine first argues the court should have granted her motion to dismiss because SSA failed to meet its burden of proof on the challenged allegations. (§ 350, subd. (c); *In re Kiesha E.* (1993) 6 Cal.4th 68, 79, fn.8.) She repeats her claims made below, that the factual inconsistencies in Jose’s story render his reports of abuse by Jasmine incredible and there is no evidence that Jasmine performed the alleged acts for sexual arousal or gratification.

SSA is required to prove the allegations of a dependency petition by a preponderance of the evidence. (§ 355, subd. (a).) By denying the motion to dismiss the sexual abuse allegations, it effectively determined SSA had made a prima facie case of their truth before Jose testified. We review the court’s determination for substantial evidence.

Jose’s reports of sexual touching by his siblings was inconsistent in the details, i.e., how many times, where, when. But he consistently reported to different interviewers that he had been sexually touched by Jasmine, and he specifically described the sexual touching by her. Furthermore, the acts he described support an inference that Jasmine’s purpose was “sexual arousal or gratification” (§ 300, subd. (d); Pen. Code, § 11165.1, subd. (b)(4).) The record contains substantial evidence to support the trial court’s conclusion.

Jasmine next challenges the jurisdictional findings in general, again contending they are not supported by substantial evidence. She repeats her challenge to the sexual abuse finding, claiming Jose’s testimony revealed a story not told before and merely emphasized his unreliability. But the trial court found Jose’s testimony compelling. We will not interfere with its determinations of credibility. (See *In re Lucero L.* (2000) 22 Cal.4th 1227, 1250.)

Jasmine attacks the severe physical abuse finding, contending the mother’s “anger control problem” does not constitute the type of harm the statute was designed to protect against. In addition to the mother’s hostile and defiant behavior, however, the petitions allege the mother disciplines the children by striking them with a belt and that she struck Alex “with such force that he fell backwards, hitting his head.” Section 300, subdivision (a) extends the protection of the juvenile court to a child who has suffered, or is at risk for suffering, “serious physical harm inflicted nonaccidentally upon the child by the child’s parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child’s siblings, or a combination of these and other actions by the parent or guardian which indicate the child is a risk of serious physical harm.” These allegations are sufficient to sustain the finding under this subdivision.

Jasmine also attacks the failure to protect finding, again contending the mother’s alleged defalcations do not warrant juvenile court intervention. Section 300, subdivision (b) requires parental neglect that causes serious physical harm or illness or the substantial risk of either. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) The court may look at past incidents that establish a “pattern of behavior resulting in inadequate supervision.” (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1650.) The record amply supports the finding.

Jasmine's final contention is that her removal from her mother was not necessary to protect her from future harm as long as Jose was out of the home.² But Jasmine was still at risk for physical abuse from her mother and inappropriate sexual behavior with her other siblings. The mother had not acknowledged the sexual behavior that was going on among the children, and the sleeping arrangements had not changed. Furthermore, she admitted she used a belt to discipline the children. At the time of the dispositional order, there were no reasonable means in place to protect Jasmine from harm. (§ 361, subd. (c)(1).)³

DISPOSITION

The judgment of the juvenile court is affirmed.

SILLS, P.J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

² Jasmine also contends it was error to remove her siblings, with the exception of Jose. She has no standing to challenge the orders on behalf of her siblings, who have not appealed.

³ Our independent review of the juvenile court file and letter briefs for the minors reveal that as of July 2002, the mother began a 60-day trial visit with the four youngest children. Jasmine was allowed overnight weekend visits. Jose is placed "in a foster care placement where he is the only child in the household."